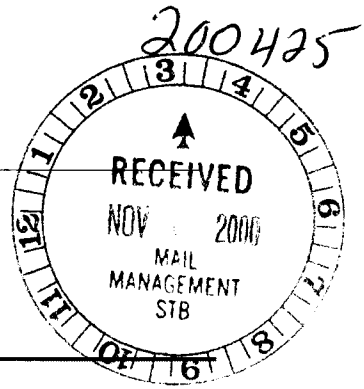


SK Snavelly King Majoros O'Connor & Lee, Inc.

Economic and Management Consultants
1220 L St. NW, Washington, DC 20005

(202) 371-9149 Email TomOConnorSK@AOL.Com



November 17, 2000

Mr. Vernon Williams
Secretary
Surface Transportation Board
1925 K St. NW
Washington, D.C. 20423-0001

Via Hand Delivery

Dear Mr. Williams:

In response to the Notice of Proposed Rulemaking (NPR) issued by the Surface Transportation Board (STB) on October 3, 2000 in Ex Parte 582 (Sub-No.1), Major Rail Consolidation Procedures, enclosed are the Comments of BASF Corporation and the accompanying Verified Statement of Tom O'Connor.

We have provided the original and 25 copies of the filing, as well as an electronic version in WordPerfect 7.0.

We would appreciate it if your staff would date stamp the second copy of this letter for return to us. Should questions arise, please call me at (202) 371-9149.

Thank you.

Sincerely,

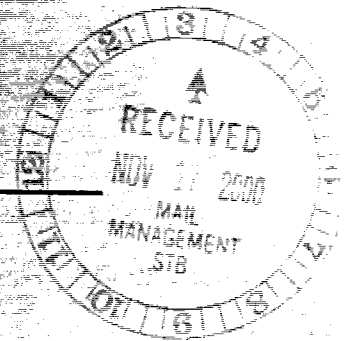


Tom O'Connor
Vice President

Ex Parte No. 582 (Sub-No. 1)

ORIGINAL

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub No. 1)

NOV 17 2000

MAJOR RAIL CONSOLIDATION PROCEDURES

Part of
Public Report

COMMENTS OF BASF Corporation

And Verified Statement of

Tom O'Connor

Snavely King Majoros O'Connor & Lee, Inc.

1220 L St. NW

Washington, DC 20005

Dated November 17, 2000

Ex Parte No. 582 (Sub-No. 1) November 17, 2000

BASF Corporation

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 582 (Sub No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF BASF CORPORATION

Ex Parte No. 582 (Sub-No. 1)

BASF Corporation

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 582 (Sub No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF BASF CORPORATION

Ex Parte No. 582 (Sub-No. 1)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 582 (Sub No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF BASF CORPORATION

BASF Corporation, by Counsel, respectfully submits these comments in response to the Surface Transportation Board's (Board or STB) Notice of Proposed Rulemaking (NPR), served October 3, 2000.

As indicated in our opening comments, filed on May 16, 2000, BASF Corporation (BASF) is a transnational corporation and a major shipper of chemicals and chemical products by rail. BASF operates a fleet of more than 4,000 rail cars that last year carried four billion pounds of product in some 22,000 rail outbound shipments. BASF is vitally concerned that further railroad mergers be considered in light of the short and long-term impact on rail shippers and the consuming public.

A careful review has been made of the Surface Transportation Board's Notice of Proposed Rulemaking. While the NPR shows promise, implementing action is needed. The need for change is effectively summarized in a recent letter to Congress signed by more than 270 industry leaders representing virtually every sector of the US economy.

The following excerpt from that letter, which appears as Exhibit A to Mr. O'Connor's Verified Statement, states the issues clearly:

"...The Staggers Rail Act was enacted in 1980 with the goal of replacing government regulation of the railroads with competitive market forces. Since that time, the structure of nation's rail industry has changed dramatically. Where there were 30 Class I railroad systems operating in the U.S. in 1979, now there are only seven. While major railroads in North America appear poised to begin another round of consolidations in the near future, the Surface

Ex Parte No. 582 (Sub-No. 1)

Transportation Board continues to adhere to policies that hamper rail competition. Structural changes in the rail industry combined with STB policies have stopped the goal of the Staggers Rail Act dead in its tracks.

We depend on rail transportation for the cost-effective, efficient movement of raw materials and products. The quality and cost of rail transportation directly affects our ability to compete in a global marketplace, generate low cost energy, and contribute to the economic prosperity of this nation. Current rail policies frustrate these objectives by allowing railroads to prevent competitive access to terminals, maintain monopolies through "bottleneck pricing," and hamper the growth of viable short line and regional railroads through "paper barriers."...

While the STB NPR may appear to address these and related issues, in fact, the NPR fails to prescribe or apply meaningful changes to serious problems; problems which the vast majority of the parties and the STB now recognize. If the NPR were to be adopted as proposed by the STB the resultant merger process would not prevent recurrence of the transportation collapse experienced in recent mergers.

While it may appear to some observers that the STB took major strides forward, in fact, the STB stopped short of any meaningful change. To a large extent, the NPR merely enumerates tasks the applicants already carry out in merger applications.

In some instances the NPR fails to address well recognized and compelling needs, as noted in Mr. O'Connor's testimony. For example, the NPR does not require the applicants to prove the combined system will work, prior to plunging into the merger at an operational level. Based on the experience of two recent disastrous mergers, this does not bode well for either the railroads or the shipper community. If regulations are adopted as proposed by the STB, shippers and other affected parties will have lost much and gained little. Despite the aforementioned, we note the "good intentions" of the NPR and propose modifications that would ensure that those good intentions are realized.

One of the more promising policy changes articulated in the NPR is enhanced competition. Mere change in policy will not result in change in the market. It is necessary to build procedures that implement those policy changes. Having agreed that competition should be enhanced; the next step is to specify procedures that will accomplish that end. Procedures must be constructed that will be effective, readily enforceable by shippers large and small, and not circumvented in application.

We note numerous areas in which the STB recognizes the need but stops short of effective action. In the accompanying verified statement, Mr. O'Connor identifies responsive and practical action the STB should take in these areas.

The four key areas identified by BASF are:

- **Critical Need for Enhanced Competition**
- **Open Gateways**
- **Challengeable Bottleneck Rates**
- **Implementation Plan and Merger Oversight**

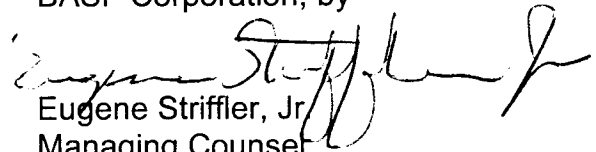
In each of these areas the need for an effective remedy is clear. The need is shown by the numerous respondents, large and small, government and private sector, supporting changes similar to those recommended by BASF. Exhibit B to Mr. O'Connor's statement summarizes the widespread support for change in these four key areas.

BASF has been paying increasing prices for decreasing service, as well as paying in other ways for a deteriorating rail system. The remedies developed by BASF in this series of filings can help reverse debilitating rail performance trends and should be adopted by the Board.

In summary these remedies include:

- **Solutions that implement the STB decision to enhance competition**
- **Comprehensive and rigorous pre-merger testing applied in a step-wise process**
- **An expanded role for short lines in solving service problems**
- **Procedures to prevent and recover economic losses caused by service failures**
- **Creation of an empowered Blue Ribbon Advisory Panel to assist in rail mergers**

Respectfully Submitted
BASF Corporation, by


Eugene Striffler, Jr.
Managing Counsel
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Mt. Olive, NJ 07828-1234

Before the Surface Transportation Board

Response to

**Notice of Proposed Rulemaking
in
STB Ex Parte No. 582 (Sub-No. 1)
Major Rail Consolidation Procedures**

**Filed on Behalf of
BASF Corporation**

**VERIFIED STATEMENT OF
Tom O'Connor**

**Vice President
Snavely King Majoros O'Connor & Lee, Inc.
1220 L St NW
Washington DC 20005**

November 17, 2000

Ex Parte No. 582 (Sub-No. 1)

I.	EXECUTIVE SUMMARY.....	10
A.	Approach.....	10
II.	SUMMARY OF RECOMMENDED ACTIONS.	12
A.	Pro-competitive Modifications	13
B.	Rebuttable Presumption	14
C.	Step-wise Implementation.....	15
D.	The STB shall guarantee shipper compensation for reduced service	16
E.	Advisory Panel.....	17
III.	SPECIFIC INITIAL COMMENTS ON STB NPR IN EX PARTE NO. 582.....	17
A.	Enhancement of Competition, Section 1180.1 (c):	17
B.	Potential Benefits, Section 1180.1(c)(1).....	18
C.	Potential harm; reduction of competition, Section 1180.1 (c)(2)(i):	19
D.	Potential harm to essential services Section 1180.1 (c)(2)(ii):	19
E.	Potential harm; transitional service problems, Section 1180.1 (c)(2)(iii).....	19
F.	Conditions Section 1180.1(d):	20
G.	Service assurance and operational monitoring, Section 1180.1(h):	20
H.	Applicant carriers Section 1180.3(b):	21
I.	Evidentiary proceeding Section 1180.4(e):	21
J.	Conditions to mitigate and offset merger harms section 1180.6(b)(10)(ii):	22
K.	Calculating public benefits Section 1180.6(b)(11):	22
L.	Downstream merger applications Section 1180.6(b)(12):	23

M.	Purpose of the proposed transaction Section 1180.6(b)(13):	23
N.	Service assurance plans Section 1180.10(a):	23
O.	Service assurance plans Section 1180.10(e):.....	25
P.	Service assurance plans Section 1180.10(i):	25
Q.	Transitional service problems Section 1180.1(c)(2)(iii):.....	25
R.	Vice Chairman Burkes' Comments:	26
IV.	SUMMARY	27
A.	Three Step Process for Operational Testing of Systems	28
B.	Service Quality and Service Guarantees	30
C.	Non-US Railroad Reporting Requirements	31
D.	STB Blue Ribbon Advisory Panel	31
E.	Simplified Rate Reasonableness Tests	32
F.	Limited Open Access	33
V.	EXHIBIT A: INDUSTRY LETTER TO CONGRESS	34
VI.	EXHIBIT B: SUMMARY OF RECOMMENDATIONS OF OTHER PARTIES	36
A.	Open Gateways	37
B.	Competitive Access	37
C.	Bottleneck Rates	38
D.	Implementation Plan	38
VII.	QUALIFICATIONS AND CERTIFICATIONS	39

I. EXECUTIVE SUMMARY

My name is Tom O'Connor. I am Vice President of the economic and management consulting firm of Snavelly King Majoros O'Connor & Lee, Inc. I have served as an economist with the Interstate Commerce Commission (ICC), the United States Railway Association (USRA), Conrail, the Association of American Railroads (AAR) and two consulting firms, including my present firm.

I was retained by BASF Corporation to review the record of this proceeding and to analyze the Surface Transportation Board's (Board or STB) present and prospective role in the impending consolidation of the railroad industry. In the Opening Statement, Reply Statement and in this response to the STB Notice of Proposed Rulemaking (NPR), I have developed, in collaboration with BASF, recommendations on rule revisions designed to retain, and enhance existing intra-modal competition while avoiding the service disruptions that have characterized recent rail mergers.

As preparation for this filing we have studied carefully the NPR issued by the STB on October 3, 2000 and the comments filed by the numerous respondents to this proceeding.

In this response, we build on the work already done by the STB, BASF and numerous respondents.

The issues are serious and will have far-reaching effect on the US economy, as indicated in a September 26, 2000 letter to Congress signed by 270 companies. That letter, included as Exhibit A, addresses core issues of this proceeding:

- Competition
- Adequacy of Service
- Interaction of rail policy and economic strength

Despite its recognition of many of the key issues, the NPR fell short of meaningful change.

A. Approach

Our recommended remedies are developed through a four-step process:

1. We summarize the key issues, review the NPR treatment of those issues and develop recommended STB actions.

2. We review the responses of the parties to this proceeding and call to the STB's attention issues with widespread support for changing the merger guidelines. Exhibit B to this filing notes the numerous respondents who support key points of our recommendations, centering on the following areas:
 - **The Critical Need for Enhanced Competition**
 - **Open Gateways**
 - **Challengeable Bottleneck Rates**
 - **Implementation Plan and Merger Oversight**
3. We build on the STB intentions as articulated in the NPR and add implementing actions.
4. We develop specific remedies and, in some cases, specific language for meaningful action by the STB, linking the STB policy changes with specific action steps to implement those ideas.

In developing our recommendations, we cite the support found in many of the analyses entered into evidence in this proceeding: widespread endorsement by other respondents of the recommended ideas and action plans.

Benefits The railroads, shippers and the economy will realize substantial benefits from the recommended actions. Enhancement of competition is an example of a key area benefiting all of these groups and one in which the STB recognizes the need for change. BASF and many others support the much-needed enhancement to competition. While the STB endorsed enhancement of competition, additional action is required to implement that STB policy change.

The NPR guidelines issued on October 3 are promising. But such promise is unrealized in the guidelines proposed in the NPR. The STB addressed many of the concerns, but failed to act on those concerns.

While the STB NPR appears to address the issues, it fails to prescribe or apply meaningful changes to serious problems recognized by the vast majority of the parties and by the STB. If the NPR were adopted as proposed, the resultant merger process would not prevent recurrence of the transportation collapse experienced in recent mergers.

In our response we build on the "good intentions" of the NPR and propose steps to ensure those intentions are realized. If regulations are adopted as proposed in the NPR, shippers,

railroads and the economy will gain little and lose much.

Largely, the NPR enumerates tasks the applicants already carry out in merger applications. While it may appear to some observers that the STB took major strides forward, in fact the STB stopped well short of meaningful change.

In some instances the NPR fails to address a clear and compelling need. For example, the NPR does not require the applicants to prove the combined system will work, prior to plunging into the merger at an operational level. Based on the experience of two disastrous mergers, this does not bode well for either the railroads or the shipper community.

One of the more promising directions of the NPR is enhancement of competition. Mere change in policy will not result in changes in the market. The STB needs to implement its policy decision by specifying procedures that enhance competition. The procedures must be specified such that they cannot be circumvented in application, and can be readily enforced by shippers, large and small.

We note numerous areas in which the STB recognizes the need but stops short of effective action. We identify responsive and practical action the STB could take and should take in many of these areas.

II. Summary of Recommended Actions

The regulatory changes we propose can be summarized as follows:

- 1. The STB should implement pro-competitive modifications:**
 - Reciprocal Switching
 - Competitive Line Rates
 - Bottleneck rate challenges
 - Trackage Rights
 - Haulage rights
- 2. The STB should adopt a rebuttable presumption that further mergers are against the public interest.**
- 3. The STB should apply comprehensive and rigorous pre-merger testing within a merger review process segmented into three sequential steps:**

- (1) Corporate Merger
- (2) Business Merger
- (3) Operational Merger

- 4. The STB should guarantee shipper compensation for reduction and loss of rail service caused by mergers.
- 5. A Blue Ribbon Advisory Panel should be created to provide timely and objective oversight during merger review and implementation.

We have developed revised code that would implement these changes. The relevant code sections included in the NPR are reproduced below along with our recommended changes, which are indicated by **bold underlined** text.

A. Pro-competitive Modifications

The proposals of some respondents go well beyond the specific merger and involve carriers other than the applicants. If overly restrictive rules are imposed on the applicants, then the applicants could be disadvantaged relative to other non-merging railroads. Reflecting these concerns, and within the context of the proposed rules, we recommend the following changes to strengthen the policy section on "potential harm":

Reduction of competition

Proposed § 1180.1(c)(2): Potential Harm. The Board recognizes...

(i) Reduction of competition. Although...will acquire and exploit increased market power. Applicants shall **identify and describe fully any and all competitive harm that the transaction may create and they shall** propose **specific** remedies to mitigate and offset **each** competitive harm. Applicants shall explain how they would preserve competitive options **to every major shipper and connecting railroad. Such pro-competitive strategies shall include the preservation of existing gateways, use of reciprocal switching, shared asset areas, competitive line rates** build-outs or build-ins, **and other pro-competitive measures**, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

This policy statement will be expanded upon in § 1180.6(b)(10). There, the STB should build in a shipper response and comment phase.

Proposed § 1180.6(b)(10): Conditions to mitigate and offset merger harms.

Applicants **shall** propose measures to mitigate and offset **all** merger harms. These conditions should not simply preserve, but also enhance, competition.

(i) Applicants must explain how they will preserve competitive options for **each group of** shippers and Class II and III rail carriers **for which potential competitive harm is identified in the market analysis performed in response to § 1180.7**. At a minimum, applicants must explain how they will preserve **and enhance** the use of major gateways, **reciprocal switching, shared asset areas, competitive line rates**, build-outs or build-ins, **and other pro-competitive measures**, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Applicants must explain how **each** transaction and condition they propose will enhance competition and improve service.

(iii) **Shippers and non-applicant carriers shall be afforded the opportunity to comment on the Applicants' proposed conditions and to recommend alternative conditions. The Applicants shall be required to respond to each such proposal with a full explanation as to its acceptability. The submission, review of and response to the views of Shippers and non-applicant carriers must be completed before the application is accepted by the STB.**

B. Rebuttable Presumption

The US Department of Agriculture (USDA) recommended that the Board adopt a "rebuttable presumption" that any further Class I mergers are not in the public interest. We strongly agree.

This presumption should be codified in the Board's regulations, as follows:

Proposed § 1180.1(a): General. To meet the needs of the public and the national defense, the Surface Transportation Board seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may **have advanced** our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board will **reject further** consolidations that reduce the railroad and other transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved....

Proposed § 1180.1(c): Public interest considerations. The Board believes...Although the Board cannot rule out the possibility that further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board **adopts the rebuttable presumption that** additional consolidation in the industry **will** result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. **To overcome this presumption,** merger applications must include provisions for enhanced competition, **with no reduction or loss of service.** Unless merger applications are so framed, approval of proposed combinations where both carriers are financially sound will cause the Board **to reject the application or, alternatively,** to make broad use of the powers available to it in 49 U.S.C. 11324(c) to condition its approval to preserve and enhance competition. When evaluating the public interest, the Board will also consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.

Proposed § 1180.1(c)(1): Potential benefits. ... A merger transaction **must** improve existing competition or provide new competitive opportunities. Applicants **must demonstrate** the net public benefits their merger will generate, and will make a good faith effort to calculate those benefits. To ensure that...

C. Step-wise Implementation

This modification requires a complete recodification of §1180. Consistent with our prior comments, we recommend comprehensive and rigorous testing applied in a 3-step merger application process, consisting of:

1. Corporate Merger
2. Business Merger
3. Operational Merger

The filing requirements for the corporate merger would consist of all financial and organizational information, along with the estimation of the downstream effects. The STB should require generalized statements of the harm and benefits of the merger and the applicants' plans for overcoming the harms. The objective would be to determine whether the applicants can establish a prima facie case which overcomes the rebuttable

presumption against further mergers. If the applicants fail the preliminary test, that ends the matter, saving the railroads, the STB and the economy in general considerable time and effort.

In our prior reply comments, we suggested that the applicants should be able to proceed to consummate a corporate merger following the first step of the process, the Corporate Merger. That is, they would be permitted to exchange stock, elect common directors, and begin merging the corporate entities.

Implementing this plan requires care and prior preparation of a retrograde movement, in case the combination needs to "un-merge". Once the corporate entities are merged, it can become difficult to contend that if the railroads fail to resolve their anti-competitive problems, they should "un-merge" into competing entities. Accordingly we suggest deferring the merger approval until Step 2. Step 1, the initial corporate application, is the "first test." Approval to consummate the merger should occur only after passing the tests in Step 2, the Business Merger.

Most requirements should be part of the second step, the business merger application. The ordering of events in the NPR should be revised to comport with the 3-Step process. In the business merger or second step, the first event should be the market study, which identifies the competitive harms. Then the applicants and participants should develop or determine the conditions that will resolve those harms and enhance competition. Following that should come shipper and small railroad comment.

The business merger should also include the operational integration plans. The business merger step should culminate in approval or disapproval of the merger. Part of the decision in the business merger step should be the schedule for the third step, the operational phase. This schedule would prescribe the testing programs, the capacity measures, and the detailed operational changes that would be required to make the merging railroads operate as one.

D. The STB shall guarantee shipper compensation for reduced service

BASF recommends a two-pronged approach to compensation. First, as a temporary remedy, shippers damaged by deteriorated service and other merger problems should be compensated in monetary terms for the losses sustained. Second, the lasting remedy is restoration of service to pre-merger or better standards. While monetary damages should continue to accrue until service has been restored, they are not the goal. Monetary damages are not sufficient to recoup the losses sustained by shippers during a merger-

related service collapse. The real and lasting remedy is restoration of service and the monetary damages are designed to motivate railroads in that direction.

E. Advisory Panel

We recommend creation of an empowered Blue Ribbon Advisory Panel to assist during merger review and implementation. The Advisory Panel should report to the US Secretary of Transportation and should assist the STB by developing objective and impartial recommendations on issues designated by the Secretary. The recommendations of the Advisory Panel should be binding on the STB unless compelling evidence indicates otherwise. The Advisory Panel would focus on technical issues for which the STB resources are insufficient. Typically these issues will be relatively short term in duration but substantial in scope. Examples include review of the railroad operating plans and approval of applicant railroad testing plans, processes, and results. The results would indicate whether the systems can be merged with some assurance that efficiency and effectiveness will not be materially harmed.

While these five areas cover the most important changes, many other areas in the NPR need adjustment and clarifications. In the next section we discuss specific changes that should be made in the NPR to address these needs.

III. Specific Initial Comments on STB NPR in Ex Parte No. 582

In the comments in this section area we identify problems and outline specific solutions.

A. Enhancement of Competition, Section 1180.1 (c):

Problem The enhancement of competition in the NPR falls considerably short of what is necessary. The enhancements, as called for by the STB, would be proposed by the applicant railroads.

In the past, applicant railroads have volunteered this type of action only to the extent required to get an application approved. In the future, one can expect the applicants to continue to propose only the minimum necessary to give the appearance of complying with this requirement.

At this advanced stage of the railroad merger process, with end-to-end mergers expected, we see limited improvements to competition. We also see possible losses in the choice of connecting carrier on east-west movements. Accordingly, enhanced competition is key.

Unless the STB is willing to condition approval on opening additional access to competing carriers, the proposed STB enhancement of competition modification rings hollow.

If the STB plan were adopted, we would expect virtually every major shipper to petition the STB for access to a competitive carrier. The predictable counter response would be either the railroads or the STB picking and choosing limited locations in which to offer or prescribe competition. Without a defined set of criteria and procedures, any enhancement of competition is likely to be at best minimal and superficial.

Solution A simple remedy is to call for all of the involved parties to propose enhancements of competition, or procedures to enhance competition. The record already established in this case identifies numerous procedures that could meet that need.

B. Potential Benefits, Section 1180.1(c)(1)

The types of benefits listed in this section of the NPR are basically those already addressed in rail mergers.

Problem The benefits to be shared with the shippers are limited to those in which the railroads operate in a competitive environment, at the time of the merger. This produces little positive change. As we showed in the initial filings, access to two or more competing railroads is for many shippers long consigned to history, due to previous mergers. Accordingly, if the sharing of potential benefits is limited to situations where the railroads currently operate in a competitive environment, those benefits are for the most part non-existent or, at best, inconsequential.

The result is simple: the benefits of the merger will tend to stay with the railroad. History has shown that lower costs resulting from the merger generally will not be passed on to the ratepayer, any more than the productivity benefits accruing pre-merger.

The end-to-end mergers now contemplated do not offer great savings to shippers unless two railroads compete on one or more segments of the movement. That condition is so rare that the STB NPR language has only superficial appeal, and generates scant positive effect.

Solution Remove the constraining condition that limits the provision to situations in which the railroads operate in a competitive environment at the time of the merger, which is very limited. Rather, apply the provision broadly and use it to truly

enhance competition.

C. Potential harm; reduction of competition, Section 1180.1 (c)(2)(i):

The applicants are designated as the parties to propose remedies to offset harms resulting from reduction of competition.

Problem This self-policing policy is weak in design and likely to be weaker in application. The proverb about foxes guarding the hen house comes to mind. The shippers or non-applicants are well equipped and motivated to identify the potential harms and appropriate remedies.

Solution The regulations should be modified to allow and encourage all of the parties to propose remedies to offset competitive harms.

D. Potential harm to essential services Section 1180.1 (c)(2)(ii):

Problem The key in this paragraph is the definition of "essential services." This definition is missing from the STB language. The meaning of "sufficient public need", a key concept in the NPR, is also unspecified. This section does not reflect beneficial policy change by the STB.

Solution Definitions of the concepts of "essential service" and "sufficient public need" must be specified to clarify the STB's intent. Without understanding of the intent, the responses may be off point and the policy implementation may be misguided.

E. Potential harm; transitional service problems, Section 1180.1 (c)(2)(iii)

Clearly, the railroads in recent mergers were unable to see the service problems before they actually arose and enmeshed railroad operations.

Problem Given the inability of the railroads themselves to foresee the problems, one wonders how the STB plans to make this determination. What facts or predictors is the STB going to use to weigh the likelihood of service problems? The NPR offers no specifics on procedures here. There is nothing in the regulations regarding pre-merger testing of the operations, or any other system for that matter. And nothing is offered by STB concerning identification and establishment of pre-merger operations benchmarks. BASF, as well as many others, raised this point. The STB has ignored the requirement to improve its handling of service quality and perpetuated procedures that produced monumental service failures.

Solution A well-targeted remedy was thoroughly developed in the earlier BASF and other filings¹. It involves adopting a step-wise and simplified approach to the merger with each step being tested and proven before moving to the next step. As noted previously, the Blue Ribbon Advisory Panel could assist in review and approval of successful completion of the steps

F. Conditions Section 1180.1(d):

Problem Again the STB designates the applicants as the parties to propose the solutions that will enhance competition. History has shown this is a prescription for incomplete and sub-competitive remedies.

Solution The STB should require shipper input and input from non-applicant railroads, and from the Advisory Panel. The STB should mandate consideration of that input by requiring a revised applicant railroad mitigation plan, reflecting shipper and non-applicant input. STB staff, applicant railroads or the Advisory Panel might produce this revised plan.

G. Service assurance and operational monitoring, Section 1180.1(h):

Problem There is no provision for pre-merger testing and review. Instead the actions of the STB are geared to post-approval actions. This is the same failed process used in recent mergers. Due to the shrinking number of railroads, any remaining mergers are critically in need of pre-merger testing. These NPR rules are an opportunity to identify and stop this type of problem before it occurs, when it is least costly to all. The STB states that it will conduct extensive post-approval monitoring. This is what the STB did in previous mergers. Moreover, the STB has lost much of its former operational STB experience through retirements, with more such retirements approaching. This raises an issue of qualified STB in-house expertise.

Recognizing the staff limitations, the STB plans to require that the applicants establish teams to solve problems. It seems fairly obvious that these will be the same people that put the operations plan together and the resultant STB process will be largely unchanged from previous mergers. As noted above, the record in recent mergers is dismal.

¹ See BASF Reply Comments and Williams Energy Services Reply Comments, in Ex Parte 582 (Sub-No.1), filed June 5, 2000.

Solution The STB must act before the merger. Discovering problems by means of another plunge into chaos is not good policy. The STB needs to take steps before the merger to reduce the chances of a repeat of the major service problems encountered in previous mergers. BASF showed in its filing, as did others², simple and proven ways this can be accomplished. The STB needs to revise its rules significantly if it is to learn from, rather than repeat, the mistakes of the past.

H. Applicant carriers Section 1180.3(b):

Problem Full reporting of appropriate data should not be obscured by national boundaries. The NPR is unclear as to whether the revenue and expense data for non-U.S. railroads must be filed in a standard STB Annual Report R-1 format, as we suggested. The Canadian railroads have a different accounting system, and a different annual report requirement. This presents the issue of quantifying benefits when they occur in Canada.

Solution This issue needs to be addressed and the requirements specified on the content and format of financial and cost data to be provided by non-U.S. railroads. Non-U.S. railroads that merge with U.S. railroads should be required to submit the same cost information to the STB on the same basis that U.S. railroads submit, and to submit it for the entire merged network. Likewise, U.S. railroads operating outside the U.S. should be required to include the costs of those operations in their reports to the STB and other regulatory agencies. These data are needed to keep railroads on an equal footing as far as disclosing their costs.

I. Evidentiary proceeding Section 1180.4(e):

The STB has stated the proceeding time frame as one year after the primary application has been accepted for a major transaction, 180 days for a significant transaction and 105 days for a minor transaction.

Problem The STB plan has a major procedural weakness. If significant problems arise, the applicants may try to handle them during the approval period. If shippers raise significant issues during the process, the STB may inappropriately defer addressing the issues due to the exigencies of ongoing operations, as they have done in the past.

Solution The basic remedies are comprehensive and rigorous pre-merger

² See for example, Opening and Reply Comments by BASF, Williams Energy Services and Oxy in Ex Parte 582 (Sub-No.1), filed May 16 and June 5, 2000.

testing and step-wise integration of systems. Step-wise integration of systems is inherent in our recommended 3-Step merger approval process. The Blue Ribbon Advisory Panel we recommend would be a logical entity to have review and approval of each step as one of its areas of responsibility. Failure to require successful pre-merger testing, with persuasive indications that the various aspects of the individual systems will mesh, makes a repetition of past trauma almost inevitable. BASF and many other shippers sustained significant damage in recent mergers. We are not eager to repeat that experience. Repetition of that drastic deterioration in service will be judged a major policy failure. It should be preventable by appropriate pre-merger testing. The STB should require no less.

Also, the requirements for formal acceptance of the application should be clearly identified in the regulations. It is necessary to specify exactly what constitutes acceptance. Since this milestone starts the one-year clock, it is extremely important.

J. Conditions to mitigate and offset merger harms section 1180.6(b)(10)(ii):

Problem This section gives the appearance of progress. However, the requirement for applicants to explain how they are going to improve service has been a part of the application process for years. UP/SP and CSX/NS/CR all included projected service improvements in their applications. Experience has shown that very few, if any, service improvements materialized. Without proper testing one cannot evaluate the merits of claimed service improvements.

Solution Comprehensive and rigorous pre-merger testing including step-wise integration of systems must be required before the STB approves a merger. Otherwise the STB has no proof that the unified system can operate efficiently.

K. Calculating public benefits Section 1180.6(b)(11):

Problem This paragraph uses the term "where possible" twice in describing quantifying benefits. The discussion mentions detailed and accurate analysis but the actual regulations confine this to "...where possible."

Solution It is reasonable to require that the applicants measure and report public benefits. The STB should require no less. Unless pre-merger testing is mandated for each of the three steps, the past will be prologue to the future; the disastrous experience of recent mergers will repeat.

L. Downstream merger applications Section 1180.6(b)(12):

This section discusses how the applicants should analyze and evaluate the impacts of downstream mergers.

Problem The estimates of downstream effects will be largely guess work on the part of applicants and will more likely evoke a heated response from the excluded railroads, than shed light on the issues. The applicants would do well to get their own data correct, much less the predictions on the actions of other railroads and estimated impacts of those actions. If this is the limit of the STB's recognition of downstream effects, the STB approach will add a burden to the applicants, but be of little value to others. More is required.

Solution Time and effort should be allotted explicitly in the procedural schedule for the comments and views of the non-applicant railroads on downstream effects.

M. Purpose of the proposed transaction Section 1180.6(b)(13):

Problem Nothing new has been proposed by the STB in this section. We again observe the appearance of change and the absence of action.

Solution The STB has thus far missed an opportunity to focus on and elevate the priority of purposes such as the public interest, enhanced competition, and maintenance of adequate service levels. The NPR gives some indication the STB will revisit this section and we encourage the STB to do so.

The STB needs to leave its passive mode and adopt a proactive pre-merger approach to identifying and solving problems. The STB must realize that the next mergers will involve coast-to-coast operations and more complex systems. Without comprehensive and rigorous pre-merger testing and step-wise integration of systems, the problems will be larger in scope and will act as an economic brake on all of North America.

N. Service assurance plans Section 1180.10(a):

This section specifies that the proposed operations are to be analyzed by applicants down to the route level.

Problem The NPR should specify that necessary and sufficient testing of the operating plan must be accomplished and the test results must be provided to the STB, the Advisory Panel, and other interested parties for evaluation. The revised regulations, as proposed by the STB, do not ask the applicants to perform any more analysis than they

did in previous mergers. CSX and NS provided data down to the train schedules on each route and yet major portions of the entire Conrail operating territory were subject to severe service disruptions. Comparing historical operating measurements to projected operations is useless unless the projected operation data has been shown to be realistic and attainable in practice.

Solution Comprehensive and rigorous pre-merger testing and step-wise integration of systems is required if service disruptions are to be avoided or at least contained and curtailed. Simply relying on sample test data, as in the Conrail acquisition, is obviously insufficient.

We propose two specific remedies for service failures that lead to "service damage." The first remedy is monetary and has two levels. At the first level, if rail service falls more than 20 percent below pre-merger levels, as measured by pre-merger transit times, the applicant railroad(s) shall be required to pay the lease costs of securing the additional equipment required to compensate for service deterioration. These equipment costs shall be paid by the railroad(s) within 30 days of receipt of the bill. The costs shall continue to accrue and shall be presented for payment monthly until transit times equal or improve on pre-merger levels.

At the second level, if service failures, based on a 20 percent or greater increase in transit times, cause a plant to curtail production or to shutdown, the railroad(s) shall pay the costs of shutdown or curtailment. Again the bill shall be paid within 30 days of its receipt by the railroad(s).

We recommend that the Blue Ribbon Advisory Panel review and certify the "service damage" bills as being reasonable. The STB, or other court of competent jurisdiction, could rule on causation if that became an issue.

In the long term of course, the only lasting remedy is restoration of service to pre-merger levels or better. However this can take months, or years, and may never be realized. In the interim, the "service damage" bills rightly assign financial responsibility for the service failure to the railroad(s) causing that failure.

We expect that applicants would consider such costs prohibitive. However, such monetary damages amount to only a small portion of the full damages sustained by shippers due to merger-related service failures.

O. Service assurance plans Section 1180.10(e):

Problem The STB requires that information technology systems must be tested as we suggested. But this is the only facet of the transaction with this requirement.

Solution Although pre-merger testing of information systems has taken place in past mergers, it was done with only a sample of the post-merger movements. Experience shows that the sample was insufficient.

As a condition of future mergers the merging railroads should be required to run parallel systems (their current system and the proposed post-merger system) for the entire merged operation for at least three months. This will demonstrate whether or not the systems to be used post-merger are capable of handling the volume of data necessary to run the merged system without computer system failures.

Many companies do this as a routine step in the process of switching to new information technology systems. For example, Conrail ran COSAC and its predecessor costing system in parallel for months before cutting over to sole use of the successor system. The STB should expand testing to be a standard requirement for all operational areas. Comprehensive and rigorous testing and step-wise integration of systems is the key.

P. Service assurance plans Section 1180.10(i):

Problem This section asks the applicants to identify potential problem areas. If areas are identified as potential problem areas then the anticipated problem should be corrected before approval of the merger. Having a "team" in place seems more of a ready excuse than an effective remedy.

Solution The requirement for preventive measures and rigorous pre-testing is clear. The people on the railroad rescue team will almost inevitably be largely the same ones that designed the initial operations in the potential trouble area. Again, we see the process defaulting to problem solving in a crisis mode rather than designing a managed and controlled rail network. This is another area where the Advisory Panel can have a positive impact

Q. Transitional service problems Section 1180.1(c)(2)(iii):

Problem Applicants should explain how they would cooperate with other carriers in overcoming serious service problems. A plan should be in place with other railroads to cope with a natural disaster or service disruption.

Solution When a natural disaster occurs the railroads have cooperated with one another so this does not loom as a problem area. Short lines have been important in developing these solutions and their role merits more prominence in the STB regulations.

Service problems require agreements in place with other railroads. The applicants can speculate about what they would do if the situation arises but without an agreement with the other railroads this may be rhetoric. The merger applicants must be required to obtain a commitment in writing from the other railroads, including involved short lines. The short line railroads have proven to be versatile and valued links in the supply chain. We urge the STB to support and expand their role in the merger process.

R. Vice Chairman Burkes' Comments:

Vice Chairman Burkes is correct: rail-to-rail competition is what is lost in mergers. Intermodal traffic, where it is truly competitive, would benefit from a merger, if the operations went as planned. However, one can question how much rail-to-rail competition will be affected by the next round of mergers, except at the gateways. The key is to enhance rail competition. Haulage rights, trackage rights and reciprocal switching are just some of the possibilities.

Vice Chairman Burkes also discusses the upstream effects on conditions imposed in previous mergers. This is a valid and important point. The STB should include upstream effects in its deliberations.

IV. Summary

We find the proposed regulations overly, and needlessly, general in nature. The proposed rules require that the railroads demonstrate how the merger will enhance competition, however, the NPR does not specify or mandate implementation steps to ensure that enhanced competition actually occurs.

The NPR fails to implement well-understood and widely recognized preventive measures and remedies such as pre-merger testing of the critical systems that will determine the success of the combined operations. The STB ignored many of the proven solutions presented by the parties to this proceeding.

As proposed by the STB in the NPR, the revised regulations fail to provide solutions to the problems experienced in previous mergers. The proposed regulations give the appearance of offering change for the future while perpetuating the failed methods of the past.

- The remedy is clear. The STB should require specific actions by the railroads centered on rigorous pre-merger testing and step-wise integration of systems within a 3-Step merger approval process. A Blue Ribbon Advisory Panel reporting to the Secretary of Transportation and empowered to deal with specific technical areas should be created to assist during the merger review, approval and implementation processes.

While, as previously presented, the NPR has numerous deficiencies, the four key areas identified by BASF as most in need of improvement are:

- **The Critical Need for Enhanced Competition**
- **Open Gateways**
- **Challengeable Bottleneck Rates**
- **Implementation Plan and Merger Oversight**

In each of these areas the need for an effective remedy is clear. The numerous respondents supporting changes similar to those recommended by BASF reinforce the clarity of the need. Exhibit B summarizes the widespread support for change in these four key areas.

The remedies presented by BASF can help reverse the debilitating rail performance trends associated with recent mergers and should be adopted by the Board.

In summary these remedies include:

- **Solutions that implement the STB decision to enhance competition**
- **Comprehensive and rigorous pre-merger testing applied in a step-wise process**
- **An expanded role for short lines in solving service problems**
- **Procedures to prevent and recover economic losses caused by service failures**
- **Creation of an empowered Blue Ribbon Advisory Panel to assist in rail mergers**

In this section we recap some of the more broadly applicable remedies for the problems noted in the NPR. Some of these are procedural, some are structural, and all work toward the same goal of a more effective and responsive merger review process.

A. Three Step Process for Operational Testing of Systems

Consistent with our prior comments, we recommend dividing the merger application into three steps:

1. Corporate Merger
2. Business Merger
3. Operational Merger

Step 1; the initial corporate application is the "first test." We suggest positioning merger approval after Step 2. Step 3 would launch the operational phase only if the applicants pass the comprehensive tests in Steps 1 and 2.

In the past, many post-merger problems occurred because the merging railroads' computer systems were not compatible. Although some pre-merger testing occurred it was limited to only a sample of the post-merger movements. Testing should be comprehensive and rigorous and should be applied in a step-wise process to determine whether the systems to be used post-merger are capable of handling the volume of data necessary to run the merged or successor system with no computer system failures. Failure of the merged computer system during the recommended test would not necessarily cause the merger to be denied – more likely it would lead to delay until the problems with the successor system are fixed. This is one of the reasons such systems are run in parallel.

Many companies do such testing as a routine step in the process of switching to new systems. For example, Conrail ran COSAC and its predecessor costing system in parallel for months before cutting over to sole use of the successor system.

Step 1. Corporate Merger. The filing requirements for the corporate merger would consist of all financial and organizational information, along with the estimation of the downstream effects. The objective would be to determine whether the applicants can make a prima facie showing that they can overcome the rebuttable presumption against further mergers. If the applicants fail the preliminary test, that ends the matter. The merger is rejected, saving the railroads, the STB and the economy in general considerable effort.

Step 2. Business Merger. Approval to consummate the merger should occur only after passing the Step 2 test, the Business Merger. And most of the requirements would be part of the second step, the business merger application. In the Business Merger or second step, the first event should be the market study, which identifies the competitive harms. Then the applicants and other participants, including the Advisory Panel, should develop or determine the conditions that will resolve those harms and enhance competition. Following that should come shipper and small railroad comment.

We see small railroads as a vital part of the solution. It is widely recognized that in service crises they have responded very well. We see routine operations as also benefiting from more inclusion of, and reliance on, small railroads. This requires careful examination of the impacts of mergers on small railroads, and development of appropriate protection for these vital links in the supply chain.

The business merger would also include the operational integration plans. The business merger step would culminate in approval or disapproval of the merger. Part of the results of the business merger step would be the schedule for the third step, the operational merger.

Step 3. Operational Merger. In this step the applicants should address the testing programs, the capacity measures and the detailed operational changes that would be required to make the merging railroad operate as one.

(1) Recommendation

As a condition of future mergers the merging railroads should be required to move toward the merger through a three step sequential process:

- 1. Corporate Merger**
- 2. Business Merger**
- 3. Operational Merger**

At each step the railroads shall test and prove their systems. The tests shall be comprehensive and rigorous. Running parallel systems (the current system and the proposed post-merger system) for the entire merged operation shall be required for as long as needed to demonstrate that the systems are equal to the challenge.

Only after completing successful tests of the key systems would the merger be eligible for approval.

B. Service Quality and Service Guarantees

Many respondents called for post-merger service guarantees. The railroads generally appear to think this should be worked out in contracts. Some railroads offered complex and basically ineffective methodologies for addressing service failures.

One rather obvious flaw in the railroad position is its reliance on contracts. Including service guarantees in contracts does not help those shippers using tariff rates. Moreover, it is our experience that many railroads resist including effective service guarantees in contracts.

The service guarantees should be reasonable – providing relief long before service disruptions threaten the operating and financial health of the shippers. As part of their merger application the railroads should be required to set aside a trust or escrow account to cover any damages that may occur as a result of the merger. The railroads need to be held accountable – and the concept of monetary damages is a simple and effective mechanism. We have outlined limited monetary damages consisting of the railroad paying the cost of car leases caused by service failures. We also outlined more extensive monetary damages for plant curtailments and shutdowns caused by railroad service failures.

While monetary damages help in the short term, the long-term remedy is restoration of service to adequate levels, defined as pre-merger or better.

(1) Recommendation

Service benchmarks for the time leading up to the merger should be established as part of the application. Service guarantees and damages should be set in advance (as part of the merger rules), either by the STB or by the Advisory Panel.

C. Non-US Railroad Reporting Requirements

Data quality and completeness should not be stopped at the border. The same data must be submitted on the same basis, on both sides of the border by US-Canadian combinations.

(1) Recommendation

If non-U.S. railroads want to merge with US railroads they should be required to submit the same operating, financial and cost information that the US railroads submit – on the same basis, for the entire network, with no exceptions. Likewise, if a US railroad is doing business outside the US they should be required to include the costs of those operations in their reports to the STB and other regulatory agencies. This should put all railroads on an equal footing as far as disclosing their costs.

D. STB Blue Ribbon Advisory Panel

Sufficient time remains in the merger moratorium to define and convene a Blue Ribbon Advisory Panel to assist in merger deliberations. The Blue Ribbon Panel would be assembled by, and would report to, the Secretary of Transportation. The filing of a merger application would activate it. Its mission would include conducting technical reviews, issuing approvals for passing milestones in the step-wise process, and other tasks assigned by the Secretary of Transportation.

This panel must be representative and balanced to ensure objectivity and impartiality. The Blue Ribbon Advisory Panel should be made up of representatives of railroads (including small railroads) and shippers (including small shippers) as well as government (including an STB representative). Compliance by the STB with the Blue Ribbon Advisory Panel recommendations would be presumed in the absence of compelling reasons to the contrary. The Blue Ribbon Advisory Panel would report to the Secretary of Transportation, who would task the panel with working on specific issues, such as the methodology for testing post-merger systems, or measurement of service benchmarks and compensatory damages.

The former Rail Accounting Principles Board offers a good model. The Rail Accounting Principles Board (RAPB) served a similar advisory function during the transition to deregulation. Railroads, shippers and other involved parties were represented on the Board. The RAPB met its goals and improved the process.

(1) Recommendation

A Blue Ribbon Advisory Panel of shippers, railroads and government should be established, reporting to the Secretary of Transportation, empowered to help the STB apply meaningful and effective changes to the merger review and approval process. It is crucial that this Advisory Panel be representative of shippers, railroads and the public at large. Compliance with its recommendations should be presumed in the absence of compelling evidence to the contrary.

E. Simplified Rate Reasonableness Tests

BASF, and many other respondents, called for permitting shippers to challenge bottleneck rates, regardless of the makeup of the through rate.

It is clear to most observers that there is little incentive for duopolists to compete. If we have only two railroads left and they both move between a given pair of gateways, they have little incentive to compete on price between those gateways. Charging lower prices can lead to unwelcome effects, from the railroad perspective. Each is implicitly aware of the possibility that price competition can grow into a price war. Charging higher prices, on the other hand, leads to much more acceptable outcomes, from the railroad perspective. These patterns encourage unreasonable rates on captive markets. Merely allowing the shipper to review the individual revenue divisions can restrain monopolistic pricing. Combining that knowledge with a simple procedure to challenge rates that are unreasonably high will remedy many of the bottleneck rate problems.

The simplified rate reasonableness challenge could also be extended to maximum rate cases. The Blue Ribbon Advisory Panel can develop procedures to make it easier for shippers to challenge a rate. Such simplified procedures can also make it less expensive to challenge rates. Currently, the cost of a rate reasonableness test is itself unreasonable and disenfranchises most shippers from seeking a regulatory remedy. The current procedures present a major impediment to regulatory access except for those with the persistence and resources to pursue the seemingly interminable and frequently fruitless pathway of maximum rate challenges.

(1) Recommendation

It is advisable to simplify this process by requiring that the rate for any portion of the move be open to challenge on its own merits.

F. Limited Open Access

Many shippers are now served by only one railroad. If the remaining railroads merge into two transcontinental systems, many shippers currently served by two carriers will see their choice effectively reduced to one. This is not because the two serving carriers will merge, but because at least one of the carriers will be able to offer a single line haul to the destination. This reasonably assumes only one carrier serves the destination (or origin).

Only in rare instances will the shipper have both the origin and destination served by both transcontinental railroads.

In the Ex Parte 582 statements, BASF and many other respondents called for relief such as trackage and haulage rights, reciprocal switching, interswitching and competitive line rates.

Trackage and haulage rights often seem to leave the traffic at the mercy of the railroad owning the tracks. Competitive line rates may be too difficult for the shipper to gain – more of a conceptual alternative than a real remedy.

The most practical alternatives would seem to be reciprocal switching and interswitching. However, these options would be unavailable to the many sole served shippers who do not have another carrier near by.

It is now time to require enhanced competition, to prevent further damage and to remedy the legacy of past mergers. This will involve application of remedies such as we have discussed in this statement and as suggested by other shippers and shipper organizations. The design and application of such remedies to enhance competition is an area in which the Blue Ribbon Advisory Panel could assist.

V. Exhibit A: Industry Letter to Congress

September 26, 2000

The Honorable John McCain
Chairman Senate Commerce Committee
Senate Dirksen Room 508
Washington, D.C. 20510

The Honorable Ernest Hollings
Ranking Member, Senate Commerce Committee
Senate Dirksen Room 558
Washington, DC 20510

Dear Chairman McCain and Senator Hollings:

We are writing to ask that shipper concerns with current national rail policy be given priority for Commerce Committee action next Congress. The Staggers Rail Act was enacted in 1980 with the goal of replacing government regulation of the railroads with competitive market forces. Since that time, the structure of nation's rail industry has changed dramatically. Where there were 30 Class I railroad systems operating in the U.S. in 1979, now there are only seven. While major railroads in North America appear poised to begin another round of consolidations in the near future, the Surface Transportation Board continues to adhere to policies that hamper rail competition. Structural changes in the rail industry combined with STB policies have stopped the goal of the Staggers Rail Act dead in its tracks.

We depend on rail transportation for the cost-effective, efficient movement of raw materials and products. The quality and cost of rail transportation directly affects our ability to compete in a global marketplace, generate low cost energy, and contribute to the economic prosperity of this nation. Current rail policies frustrate these objectives by allowing railroads to prevent competitive access to terminals, maintain monopolies through "bottleneck pricing," and hamper the growth of viable short line and regional railroads through "paper barriers."

We applaud the Commerce Committee's leadership on behalf of consumers concerning proposed mergers in the airline industry. America's rail consumers also need your support and leadership to respond effectively to the dramatic changes that are underway in the rail industry. Bipartisan legislation is currently pending in both the Senate and House of Representatives that takes a modest, effective approach in attempting. Please work with us and take the steps that are needed to create a national policy that ensures effective, sustainable competition in the rail industry.

Sincerely,

____ Signed _____
Fred Webber, President and CEO
American Chemistry Council

____ Signed _____
Glenn English, CEO
National Rural Cooperative Association

____ Signed _____
Alan Richardson, Executive Director
American Public Power Association

____ Signed _____
Tom Kuhn, President
Edison Electric Institute

____ Signed _____
Henson Moore, President and CEO
American Forest and Paper Association

cc: Member of Senate Commerce Committee

Ex Parte No. 582 (Sub-No. 1)

VI.Exhibit B: Summary of Recommendations of Other Parties

A. Open Gateways

The following parties agreed with key elements of our **Open Gateways** proposal:

Canadian Pulp & Paper
CMA
CSX
• Only applies this principle to
"traditional" gateways
Dow
DuPont
Glass Producers Transportation
Council
NITL
PPG
PPL Montana
Proctor & Gamble
Shell
Society of Plastics Industry
UP
• Only applies this principle to
"traditional" gateways
USDA
• Also discusses opening
previously closed gateways
USDOT

B. Competitive Access

The following parties agreed with key elements of our **Competitive Access** proposal:

Alliance for Rail Competition
American Shortline and Regional
Railroads
Canadian Pulp & Paper
Canadian Resource Shippers
Corp.
CMA/APC
Consumers United for Rail Equity
Dow
DuPont
Farmrail
Glass Producers Transportation
Council
MRL
MRL, I&MRL
National Association of
Port Authorities
NITL
Ohio Rail Development
Commission
Ports of Seattle, Tacoma, Everett
PPG
PPL Montana
Proctor & Gamble
Shell
Society of Plastics Industry
USDA
USDOT
Western Coal Traffic League
Weyerhaeuser

C. Bottleneck Rates

The following parties agreed with key elements of our **Revision of Bottleneck Rates** proposal:

Alliant Energy Corporation
Canadian Pulp & Paper
CMA/APC
Consumers Energy Company
Consumers United For Rail Equity
DOW
DuPont
Glass Producers Transportation
Council
NITL
Ohio Rail Development
Commission
PPG
PPL Montana
Proctor & Gamble
Society of Plastics Industry
UP
USDOT
Western Coal Traffic League

D. Implementation Plan

The following parties agreed with key elements of our proposal calling for a **Detailed Implementation Plan with Merger Oversight Mechanisms**:

Amtrak
CA Attorney General
California Public Utilities
Commission

Canadian Pulp & Paper
CMA/APC
CSX
• Lacks mention of benchmarks
and real-time simulation
DME
DuPont
Finger Lakes Railway Corp.
GM
Iowa DOT
National Mining Association
NITL
Port Authority of NY & NJ
PPG
Society of Plastics Industry
State of NY
UP
US Clay Producers
USDOT

VII. Qualifications and Certifications

Tom O'Connor: Experience
Snavely King Majoros O'Connor & Lee,
Vice President (1988-Present)

Mr. O'Connor has more than twenty-five years experience in the transportation industry. His experience includes key and increasingly responsible management and policy positions with government agencies and private industry.

Mr. O'Connor, in recent years has conducted analyses for the Government of Canada used to shape policy for freight transportation transport policy. He also has developed the Master Plan for Management Information Systems and computer facilities to measure, manage and monitor both rail freight and rail passenger transportation for the Bulgarian State Railways, in Bulgaria and the Balkan Peninsula. He has created and managed numerous computerized transport management and regulatory systems and is a widely recognized expert on costing and economics.

Mr. O'Connor has analyzed more than 45 rail merger scenarios and cases. He has provided expert testimony before state and federal courts and commissions in the U.S. and Canada on economic and policy issues. He has also testified as an expert on computerized transportation analytical systems, rail operations, anti trust issues and transportation costing. Mr. O'Connor also has served as an impartial and expert monitor of data and processes at issue in litigation on transportation.

Within the litigation arena, Mr. O'Connor has also conducted management audits of railroads, focused on identifying the cause and effect relationships underlying claimed cost incidence. The management audits were directed toward testing the cost basis of bills submitted by major railroads.

DNS Associates Inc.,
Vice President (1982 - 1988)

Mr. O'Connor directed and participated in numerous projects including merger analyses, transportation infrastructure analyses, plant and network rationalization and feasibility studies. He designed and implemented mainframe and microcomputerized systems for analyzing rail,

truck and barge logistics. The computerized cost systems Mr. O'Connor created are in widespread use throughout the United States and Canada.

Mr. O'Connor also advised the U.S. Rail Accounting Principles Board on the costing aspects of regulatory reform policies. He also provided expert testimony on computerized data bases and cost systems and related rail cost issues before the Interstate Commerce Commission.

Association of American Railroads,
Assistant Vice President, Economics
(1979 - 1982)

Mr. O'Connor designed and managed major economic analysis projects. He helped formulate industry economic policy positions culminating in the Staggers Rail Act of 1980. He submitted expert testimony on behalf of the railroad industry in numerous cases before the Interstate Commerce Commission and state regulatory commissions. He also appeared regularly in national forums on economic issues.

Mr. O'Connor directed the most significant computerized industry Costing System project in 40 years, URCS, the cost system now used by all major US railroads. He also conducted industry seminars on URCS and related economic issues.

Mr. O'Connor also testified before the Interstate Commerce Commission on the design and application of this pathbreaking rail cost system since adopted by the Commission and the rail industry.

He also directed development and installation of a commercial computerized economic and market analysis system now used by virtually all major US railroads.

Consolidated Rail Corporation,
Assistant Director, Cost & Economics
(1977 - 1979)

Mr. O'Connor was responsible for all Conrail management and regulatory cost analyses in both freight and passenger areas. He testified before the ICC on the development of subsidy standards now widely used in the US railroad industry. He also finalized the design, and implemented and

managed Contribution Simulator and Calculator (COSAC), a computerized internal management economic analysis system at Conrail. The COSAC system uses specific management accounting data to develop economic costs. COSAC replaced earlier systems and was used to guide virtually all transportation management decisions.

Mr. O'Connor also participated in cost allocation negotiations between Amtrak and Conrail on cost sharing of joint facilities on the NorthEast corridor. He initiated and directed profit maximization and plant rationalization programs. He also designed and implemented computerization and improvement of a wide range of economic and cost analysis systems used to manage this multi-billion dollar corporation.

**R.L. Banks & Associates Inc.,
Consultant (1976 - 1977)**

Mr. O'Connor conducted and directed numerous transportation- related projects in the U.S. and Canada ranging from national logistics analyses to site-specific studies. He specialized in costing systems and appeared as an expert witness on such systems in a precedent setting proceeding before a Canadian Crown Commission.

**U.S. Railway Association,
Manager, Local Rail Service Planning (1974 - 1976)**

Mr. O'Connor developed, computerized and implemented the light density lines cost analysis system, which defined Conrail. He served as liaison with congressional staffs and shipper groups, as well as federal, state, and local governments, and planning agencies. The system he created was a major element in the design and implementation of the streamlined Midwest-Northeast regional rail system. Mr. O'Connor subsequently appeared as an expert witness to

present and defend the operation of the USRA costing system.

**Interstate Commerce Commission,
Economist, (1973-1974)**

Mr. O'Connor served as a staff economist and authored a report analyzing industry investment patterns and ICC regulatory policy, including ICC use of cost evidence.

Education

University of Massachusetts, Amherst, B.A. Economics
University of Wisconsin, Graduate Course Work, Economics
University of Delaware, Graduate Course Work, Business Management
The American University, Graduate Course Work, Computer Science

Professional Organizations

Transportation Research Board
• Former Chairman Surface Freight Transportation Regulation Committee
Transportation Research Forum
• Former President of the Cost Analysis Chapter
National Defense Transportation Association
• Member of Board of Directors, National Capital Chapter
Phi Beta Kappa academic honors society
Phi Kappa Phi academic honors society

Military

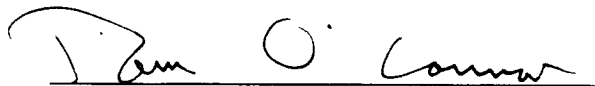
U.S. Army; Sergeant, Combat Engineers

Security Clearance

Secret

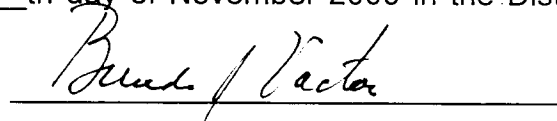
VERIFICATION

I, Tom O'Connor, declare under penalty of perjury that the foregoing statement is true and correct and was prepared by me or at my direction. Further, I certify that I am qualified and authorized to file this statement. Executed on November 17, 2000.



Tom O'Connor

Subscribed and sworn to before me this 17th day of November 2000 in the District of Columbia.



Notary Public

My Commission expires 3 June 2003

Notice of Service

Copies of this Verified Statement and the accompanying Comments were served by first class mail on the Parties of Record for Ex Parte 582 (Sub No.-1).



Tom O'Connor

Ex Parte No. 582 (Sub-No. 1)